In the
Supreme Court of the United States

OCTOBER TERM, 1947

No. 39

AERO MAYFLOWER TRANSIT COMPANY, a Corporation,

Defendant and Appellant,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, HORACE F. GASEY, LEONARD C. YOUNG, and PAUL T. SMITH, as Members of and Constituting said Board of Railroad Commissioners of the State of Montana,

Plaintiffs and Appellees.

BRIEF OF APPELLEES

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

R. V. BOTTOMLY,
Attorney General of Montana;

CLARENCE HANLEY,
Assistant Attorney General of Montana;

EDWIN S. BOOTH,
Special Assistant Attorney General of Montana,

Counsel for Appellees.

INDEX

TABLE OF CASES CITED

STATUTES CITED

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I.

THE OPINION OF THE COURT BELOW

The decision of the Supreme Court of the State of Montana, dated June 29, 1946, was rendered on an appeal from the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow. This decision became final on September 19, 1946, upon the denial of the petition for rehearing. The decision has not appeared in the official reports but is reported in 172 Pac. (2d) 452 and is found on page 103 of the Record.

II.

STATEMENT OF THE CASE

Counsel has made a detailed and exhaustive statement of the case in appellant's brief. We desire to submit this simplified statement of the case which sets forth the facts and issues presented in this appeal.

The Motor Carrier Act of Montana, pertinent parts of which are set forth in this brief and the Appendix, applies to the transportation of property by motor vehicle for hire, over or upon the highways of Montana. Section 3847.23, Revised Codes of Montana, 1935, (App. 53) provides this Act is applicable to commerce among the several states of this Union, insofar as the application may be permitted under the provisions of the Constitution of the United States and Acts of Congress. Section 3847.16, Revised Codes of Montana, 1935, (App. 50) provides that every motor carrier shall pay flat fee of ten dollars ($10.00) for every vehicle operated by the carrier over or upon the highways of Montana, in the manner specified in the statute. Section 3847.27, Revised Codes of Montana, 1935, (App. 54) provides for the payment of a fee of one-half of one per cent on the amount of gross operating revenue payable quarterly and subject to the minimums specified in the section.

In 1935 Aero obtained from the Board of Railroad Commissioners of the State of Montana, Permit No. 1354. This permit authorized interstate service by the appellant over and on the public highways of Montana. (R. 11) Commencing with the year 1936, the appellant refused to pay the fees provided by Section 3847.16, Revised

Codes of Montana, 1935, and 3847.27, Revised Codes of Montana, 1935. On September 19, 1939, the Board of Railroad Commissioners issued an Order to Show Cause to the appellant herein, as to why the permits granted by the appellee Board should not be cancelled for non-compliance with the rules and laws of the State of Montana. (R. 35.) Return to this Order to Show Cause was made (R. 36) on October 9, 1939. After considering the Order to Show Cause and the return of the appellant to such order, the Board issued its order cancelling and terminating the authority granted by the Board of Railroad Commissioners of the State of Montana to the Aero May-Flower Transit Company for failure to pay fees and to comply with the rules and regulations of the Board. (R. 45.)

On October 13, 1939, the Board of Railroad Commissioners of the State of Montana filed suit in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, wherein it sought an injunction to prevent the operation of appellant herein, over or upon the highways of the State of Montana, in violation of the State Act. (R. 1-4.) Issue was joined on this case and hearing was held before the Court. The District Court of the Second Judicial District of the State of Montana made its findings of fact and conclusions of law, wherein it found that Section 3847.16, Revised Codes of Montana, 1935, was a valid exercise of legislative authority and that the appellant should be enjoined until it paid the fees specified to be due under that section. The Court found that Section 3847.27, Revised

Codes of Montana, 1935, was invalid for the reason that it failed to specify any method by which the gross revenue of the defendant may be determined, and for the further reason the Public Service Commission of the State of Montana has nothing to do with the regulations and supervision of the motor carriers. (R. 95-97.) Amended final judgment was issued in conformity with such act. (R. 97-98.)

An appeal was filed with the Supreme Court of Montana by each of the parties, as to that part of the judgment which was against them. (R. 99-100.) The Supreme Court of Montana filed its opinion, (R. 103-123) wherein by a four to one decision, it found that Section 3847.16 was applicable to the vehicles operated by the appellant on the highways of Montana and that Section 3847.27 was applicable to the gross revenue derived from operations over or upon Montana highways, subject to the minimum fees specified in said section, and found that appellant should be enjoined until it complied with the provisions of the Motor Carrier Act of Montana and particularly with the sections providing for fees specified above.

This appeal is taken from the decision of the Supreme Court of Montana on the grounds specified in the Specifications of Error.

III.

ARGUMENT

Introduction.

It will be the purpose of this introduction to explain certain matters appearing in the record and the statutes of the State of Montana, but which are not involved in the issue presented. We may thus avoid any misunderstanding by reason of the appearance of these matters in the record briefs.

The record contains a judgment on remittitur filed October 28, 1946 (R. 140) and a second judgment on remittitur dated January 3, 1947 (R. 154). The first judgment (R. 140) purported to be in compliance with the judgment and order of the Supreme Court of Montana which became final on September 19, 1946, and from which this appeal is taken. This judgment provided that the appellant herein be restrained from operating its vehicles for hire on the public highways of Montana until it paid the fee required to be paid by the two statutes here involved for the years 1936, 1937, 1938 and 1939. Appellees herein believed that the decision of the Supreme Court of Montana entitled them to a judgment restraining appellant herein from operating in Montana until the fees under both statutes for each year, from 1936 to the date of compliance, were paid. A special proceeding was brought in the Supreme Court of Montana to compel the District Court to enter a judgment in conformity with the decision and order of the Supreme Court of Montana rendered in this case. (R. 123). On December 19, 1946, the Montana Su-

preme Court rendered its decision and order holding that appellees were entitled to a judgment restraining appellant herein from operating its vehicles for hire on the public highways of Montana until it makes report and pays the fees required by Sections 3847.16 and 3847.27, Revised codes of Montana, 1935, (App. 50, 54) for each year from 1936 to the date of compliance. The decision of the Montana Supreme Court in the supplemental proceeding has not been officially reported, but is reported as State ex rel. Board of Railroad Commisisoners et al. v. District Court of the Second Judicial District of Montana, in and for Silver Bow County, et al., 175 Pac. (2d) 173.

After this decision became final the lower state court rendered its second judgment on remittitur. (R. 154)

Each of the judgments on remittitur was issued for the purpose of carrying out the judgment of the Montana Supreme Court, involved in this appeal (R. 103 and following). The lower court had nothing further to do than carry the judgment into effect. Neither of the judgments present any issue on fact. We need not consider them further.

Section 3847.27, Revised Codes of Montana, 1935, involved in this action was amended by Section 2, Chapter 73, Laws of Montana, 1947. The amended sections are set forth in full on pages 55-57 of the Appendix. This amendment was made after the appeal in the instant case was perfected and can have no possible effect on issues now before this Court. While incidental reference will be made to this amendment, we recognvize that this case must be decided on the statutes os they existed throughout the

pendency of this action. We believe, however, that the Court should be advised of the amendment and have therefore set it forth in the Appendix. It will be seen that the effect of this amendment is to clarify the statutes to conform to the administrative practice of the appellee Board and to the interpretation placed on the original section of the statutes by the Supreme Court of Montana in this case.

SUMMARY

Point. A. The decision of the Supreme Court of Montana, holding that persons engaged in the transportation of property for hire in interstate commerce and using the highways of the State of Montana are required to comply with and pay the fees prescribed by Sections 3847.16 and 3847.27, Revised Codes of Montana, 1935, is a correct interpretation of the Motor Carrier Act of Montana. Section 3847.16, Revised Codes of Montana, 1935, provides for a flat fee per vehicle operated on the highways of Montana by motor carrier, as defined in the act. This fee is payable annually before the vehicle operates on the highways of the state for hire. It is not conditioned on the amount of use to be made of the highways. The Motor Carrier Act provides that it is applicable to carriers engaged in interstate and foreign commerce insofar as such application is permitted by the Constitution of the United States and Acts of Congress. Section 3847.27, Revised Codes of Montana, 1935, prescribes a "gross revenue fee of ½ of 1 percent of the gross operating revenue." This fee is payable quarterly after the fee is earned. It is subject to an annual minimum, provided the fee on the percentage

of gross revenue does not equal a certain minimum. This minimum is computed on the number of vehicles operated under the Motor Carrier Act. The lower court interpreted the phrase "gross operating revenue" to mean "gross revenue from operations in Montana." This interpretation is the only possible interpretation which can be placed on the phrase, under the provisions of the Motor Carrier Act, the various decisions, and the controlling rules of statutory construction. The fees prescribed by each of the sections are conditioned "in consideration of the use of the highways of the state." No method or formula is necessary to determine gross operating revenue in Montana. The Montana Supreme Court has correctly interpreted the Motor Carrier Act of Montana as being applicable to this appellant.

Point B. The meaning and interpretation of the Motor Carrier Act is a matter of statutory construction of state law. It is the duty and province of the Montana Supreme Court to determine the construction to be placed on state laws. The decision of the State Court becomes a part of the act to the same extent as though the act were written as interpreted. The decision of the Montana Court as to the Montana Motor Carrier Act is binding on this Court. The question remaining for this Court is whether, as enacted by the Legislature of Montana and interpreted by the Supreme Court of Montana, the fees prescribed by Sections 3847.16 and 3847.27, Revised Codes of Montana, 1935, are in violation of the provisions of the Constitution of the United States.

Point C. The right of the state to levy fair and reason-

able taxes as compensation for the privilege of using its highways by interstate carrier is firmly established and such taxes are not forbidden burdens on interstate commerce. The fees assessed against motor carriers for operations on Montana highways are declared by the legislature to be compensation for the use of the highways. The flat fee is collected before operation and the gross revenue fee, subject to the minimum fee, is definitely related to the beneficial use made of the highways. The method of collection shows the fees are collected for the use of the highways. The fact that the money is not actually used fo highway purposes is immaterial, so long as the purpose of the assessment is proper. There is no federal statutory prohibition to such taxes so long as the taxes do not constitute a forbidden burden and are not discriminatory. They may be applied to solely interstate carriers under the rules announced by this Court. The fees prescribed by the Montana statutes considered either separately or collectively are nominal and not unreasonable. They are not hostile to interstate commerce. The burden was on appellant to show that the fees are unreasonable, but no such showing has been made. The fact that appellant does not make the use of the highways permitted by the payment of the fees does not show that such fees are unreasonable. The fees assessed are properly chargeable against interstate carriers on interstate transportation and no apportionment of interstate and intrastate revenue is required as in taxes which may affect local and interstate business where compensation for a facility furnished is not involved. An interstate carrier is properly enjoined

from operating on Montana highways until it complies with reasonable and proper laws applicable to its operations.

Point D. The fees prescribed by the Montana Motor Carrier Act are applicable to all carriers operating on the public highways of Montana and are fixed according to a uniform, fair and practical standard. As to an interstate carrier, the fees are applicable only to operations conducted in Montana. The act is not discriminatory against interstate commerce. There is no possibility of any other state taxing the appellant for the same privilege. The collection of the fees prescribed as applied to appellant are not in violation of the equal protection or due process clause of the Constitution of the United States.

Point A.

The Motor Carrier Act of Montana, and Particularly the Provision Providing for Fees, Applies to Interstate Carriers of Persons and Property for Hire on the Highways of Montana.

Many of the errors specified by appellant (R. 146-149) relate entirely to the intepretation of the state statutes. Before discussing the federal questions involved we will discuss the interpretation of these statutes as made by the Supreme Court of Montana and as raised by these specifications of error.

The Montana Motor Carrier Act Generally

The Motor Carrier Act was enacted in 1931. Sections 3847.27 and 3847.28, Revised Codes of Montana, 1935, were added to the act by Chapter 100, Laws of 1935. With the exception of minor amendments, not involved

here, the act has not been changed since its enactment.

Section 3847.1, Revised Codes of Montana, 1935, reads in part:

> "Unless the language on contest clearly indicates that different meanings are intended, the following words, terms and phrases shall for the purpose of this act, be given the meanings hereinafter subjoined to them.
>
> "(a) The word 'board' means the board of railroad commissioners of the State of Montana.
>
> * * *
>
> "(h) The term 'motor carrier', when used in this act means every person or corporation, their lessees, trustees, or receivers appointed by any court whatsoever, operating motor vehicles upon any public highways in the State of Montana, for the transportation of persons and/or property for hire, on a commercial basis either as a common carrier or under private contract, agreement, charter or undertaking.
>
> * * *
>
> "(j) The word 'compensation' as used in this act shall mean the charge imposed upon motor carriers in consideration of the use of the highways in this state by such motor carriers, as provided in section 3847.16."
>
> * * *

Section 3847.2, Revised Codes of Montana, 1935, reads in part:

> * * *
>
> "(b) It shall be unlawful for any corporation or person, its or their officers, agents, employees or servants, to operate any motor vehicle for the transportation of persons and/or property for hire on any public highway in this State except in accordance with the provisions of this act."

Section 3847.16, Revised Codes of Montana, 1935,

(App. 50) provides for the payment of a fee of $10.00 per annum per vehicle, payable in advance on vehicles operated by "motor carriers as defined in this act" on the public highways of Montana. Section 3847.27, Revised Codes of Montana, 1935, (App. 54) provides for a gross operating revenue payable by every "motor carrier holding a certificate of public convenience and necessity." This latter fee is payable quarterly on the revenue of the preceding quarter and is subject to an annual minimum of $15.00 per vehicle for each vehicle registered and/or operated by a Class "C" carrier and $30.00 per vehicle for each vehicle registered and/or operated by Class "A" and "B" carriers. Each of these fees are in addition to all other licenses, fees and taxes imposed upon motor carriers, and are in consideration of the use of the highways of this state. There is not one word which would indicate an intention to exempt any interstate carrier using the highways of Montana from the provisions of the act. On the contrary, Section 3847.23, Revised Codes of Montana, 1935 (App. 53) provides that the act applies to interstate commerce, insofar as such application may be permitted under the provision of the Constitution of the United States and Acts of Congress.

Whether the Constitution of the United States or Laws of Congress prohibit the enforcement of the provisions of the Motor Carrier Act will be discussed later in this brief. From the clear and unmistakeable language of the act there can be no question but that the legislature intended the act to apply to all transportation of property for hire over or upon the public highways of Montana. There is

nothing in the act to indicate any different treatment of the classes of motor carriers whether they operate intrastate, interstate or interstate and intrastate. As the Montana Court said:

> "The Act was obviously intended to apply to motor carriers operating over the highways of the State." (R. 113.)

There can be no question but that appellant is a "motor carrier," as defined in the Montana Act, when it operates its vehicles for hire upon the public highways of the state. The appellant complied with the Motor Carrier Act and obtained a permit from the appellee Board, authorizing it to transport property in interstate commerce for hire over and on the public highways of Montana (Def. Answer R. 11). On October 9, 1939, the Board cancelled the permit of appellant for failure to pay the fees provided by the Motor Carrier Act (Def. Answer, R. 12, 45, 46). In fact this appellant recognized the Motor Carrier Act of Montana by applying for a permit, as in the act provided, but refused to pay the fee prescribed.

Section 3847.16 Is Applicable to Appellant.

Section 3847.16, Revised Codes of Montana, 1935, (App. 50) provides that "every motor carrier as defined in this act," *appellant herein*, shall, annually pay the *appellee* Board the sum of ten dollars ($10.00) for every motor vehicle operated by the carrier over or upon the public highways of Montana. That this section was intended to apply to interstate carriers is definitely shown by sub-paragraph (b) which provides that when transportation service is rendered partly in this state and partly

in an adjoining state or foreign country, motor carriers shall comply with the provisions of the act relating to the payment of compensation (the fee prescribed in this section), in the same manner as motor carriers operating wholly within Montana.

The Application of Section 3847.27.

Section 3847.27 (App. 54) was enacted as Section 2, Chapter 100, of the Laws of 1935. It will be noted that this section refers to the Public Service Commission. The State District Court held that this section was invalid for the reason that the Public Service Commission mentioned in the section has nothing to do with the regulation and supervision of motor carriers using the public highways of the State of Montana. (R. 96.) There can be no question but that the "Board of Railroad Commissioners" should have been used in Section 3847.27.

The Board of Railroad Commissioners was created in 1907. (Section 3779, Revised Codes of Montana, 1935.) The Public Service Commission was created in 1913. (Section 3879, Revised Codes of Montana, 1935.) Section 3880, Revised Codes of Montana, 1935, reads in part as follows:

> ". . . . The board of railroad commissioners of the state of Montana shall be ex-officio the public service commission hereby created, and for the purposes of this act shall be known and styled 'Public Service Commission of Montana.' . . ."

Both Boards are the same. After reviewing the statute and the duties of the two Boards the Montana Supreme Court said:

> "The terms 'Board of Railroad Commissioners' and 'Public Service Commission' are used interchangeably and we think it was the legislative intent by section 3847.27 to use the words 'Public Service Commission' as including the 'Board of Railroad Commissioners.' If this were not so, then Section 3847.27 would have no meaning whatsoever, since strictly speaking the Public Service Commission does not issue certificates of public convenience and necessity." (R. 116.)

One of the reasons for the recent amendment to Section 3847.27, Revised Codes of Montana, 1935 (App. 54) was to correct this error by substituting the words "Board of Railroad Commissioners" where necessary. The amendment has no bearing on this case.

Section 3847.27, Revised Codes of Montana, 1935, (App. 54) provides that every motor carrier holding a certificate of public convenience and necessity shall quarterly file a statement showing "gross operating revenue for the preceding three months of operation," and shall pay a fee of one-half of one percent of the amount of such gross operating revenue, subject to a minimum annual fee for each vehicle registered and/or operated under the Motor Carrier Act. As has been pointed out above, the appellant is a "motor carrier" within the meaning of the act. It transported property for hire over and upon the highways of Montana in interstate commerce. (R. 8, 13-15, 61, 62.) The vehicles used in Montana were required to be registered with the Board under Section 3847.16. Revised Codes of Montana, 1935, and were operated under the Motor Carrier Act. Prior to the cancellation of its permit for non-payment of fees, appellant held author-

ity to operate its vehicles on the highways of Montana from appellee Board. (R. 11, 12, 59.) There is no indication that it was intended to exempt interstate carriers from the fee prescribed by this section. To the contrary, a reading of the Motor Carrier Act in its entirety and particularly Section 3847.23, Revised Codes of Montana, 1935, (App. 53) shows a very specific intent to include interstate carriers within the provision of 3847.27. The Montana Court was correct in so holding (R. 113, 114.).

The Definition of "Gross Operating Revenue."

Appellant specifies as error the holding of the Montana Court, that "gross operating revenue" as used in Section 3847.27, Revised Codes of Montana, 1935, (App. 54) means "gross revenue derived from operations in Montana." It also specifies error of the Court in *gratuitously* assuming that appellant derives gross revenue "from operations in Montana" to which the tax could be applied. (Spec. of Error B IV, VI, VIII; R. 148, 150.) Appellant would have the words "gross operating revenue" mean all revenue of the appellant wherever earned. Such a holding by the courts would, in fact, be a gratuity for it would give away the fees intended to be collected by making them unconstitutional. A most cursory examination of the statutes shows that such a contention is not only unsound and untenable, it is ridiculous and absurd.

The Motor Carrier Act relates to the carriage of persons and/or property for hire on the public highways of Montana. Section 3847.16 (b), Revised Codes of Montana, 1935, (App. 50) provides that carriers who engage in

interstate or foreign commerce shall file reports showing the "total business performed within the limits of this State." Section 3847.23, Revised Codes of Montana, 1935, (App. 53) provides that the provisions of the act are applicable to interstate carriers insofar as permitted by the Constitution of the United States and the Acts of Congress. These provisions of law were in existence when Section 3847.27, Revised Codes of Montana, 1935, was enacted. This section states that the fees are "in consideration of the use of the highways of this state" and the minimum fees are based on the vehicles using the highways of Montana under the Motor Carrier Act.

The legislature knew that only business performed in this state was to be reported to the Board. It likewise knew that it could only tax interstate vehicles for the use of the highways for it provided that the fee was in consideration of the use of the highways. It is elementary that a state has no powers beyond its boundaries. The legislature clearly did not intend to usurp a power to require reports or levy a fee on business done in other states, or to attempt to say that a fee on business done between New York and New Jersey would be in consideration of the use of Montana highways by vehicles which never crossed Montana boundaries. To impute such an intention to the legislature or to place such a construction on the statute is out of keeping with all the rules of statutory construction and common sense.

The Board has never demanded the payment of fees based on the entire revenue of the appellant (R. 63, 64, 67, 69.). The administrative interpretation has been that "gross operating revenue" meant gross operating revenue

in Montana. The term operating revenue means revenue from operation and not gross receipts on some other basis. In its opinion, the Montana Court correctly set forth the rules of construction when it said:

> "On the question of the constitutionality of section 3847.27, this court said in the case of State v. Stark, 100 Mont. 365, 52 Pac. (2d) 890, that, 'In determining whether an Act of the legislative assembly is invalid or not, it has long been the established rule of this court that the constitutionality of any Act shall be upheld if it is possible to do so (State ex rel. Tipton v. Erickson, 93 Mont. 466, 19 Pac. (2d) 227; Halve v. County Treasurer, 82 Mont. 98, 105, 265 Pac. 60,) and that a statute "is prima facie presumed" to be constitutional, and all doubts will be resolved in favor of its validity. (State ex rel. Toomey v. Board of Examiners, 74 Mont. 1, 238 Pac. 316, 320.) The invalidity of a statute must be shown beyond a reasonable doubt before this court will declare it to be unconstitutional. (Herrin v. Erickson, 90 Mont. 259, 2 Pac. (2d) 296.) And a statute will not be held unconstitutional unless its violation of the fundamental law is clear and palpable. (Hill v. Rae, 52 Mont. 378, 158 Pac. 826, Ann. Cas. 1917E, 210, L. R. A. 1917A, 495.)'
>
> "By reading sections 3847.27 and 3847.16 together, which the rule on statutory construction enjoins, State v. Bowker, 63 Mont. 1, 205 Pac. 961, it becomes clear that the clause in section 3847.27 imposing upon the company a tax of one-half of one percent. based upon its 'gross operating revenue' that in the use of this phrase by the legislature the gross revenue derived from operations in Montana was intended and not the company's gross revenue from all sources. No other reasonable intention is conveyed by paragraph (b) of section 3847.16." (App. 50)

The decision of the Montana Court is in harmony with

the decision of this Court. In *Haggar Co. v. Helvering*, 308 U. S. 389, 60 Sup. Ct. 337, 84 L. Ed. 340, a taxation case, this Court said:

> "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose, citing authorities."
>
> *Ohio Tax Cases*, 232 U. S. 576, 591, 34 Sup. Ct. 372, 58 L. Ed. 737.
>
> *Sorrells v. United States*, 87 U. S. 435, 446, 53 Sup. Ct. 210, 77 L. Ed. 413.
>
> *Hicklin v. Coney*, 290 U. S. 169, 54 Sup. Ct. 142, 78 L. Ed. 247.
>
> *United States v. Freeman*, 15 U. S. 548, 11 L. Ed. 724.

It is true that all of appellant's business is in interstate commerce and its revenues derived from that business. But this does not mean that no revenue is derived from operations on Montana highways. The evidence of appellant shows that revenues are derived from operations in Montana (R. 62). The answer likewise alleges that the transportation is performed under contract in accordance with the rates on file with the Interstate Commerce Commission (R. 8). These facts demonstrate positively that appellant derives revenue from its operations over or upon Montana highways when it transports property on those highways. The term operating revenue is self-explanatory —it means revenue received from operations. It is not to be confused with gross receipts.

Is a Method of Determining Gross Revenue in Montana Lacking?

Five of the specifications of error set forth by appellant relate to the alleged error of the court in sustaining section 3847.27, Revised Codes of Montana, 1935, (App. 54) even though no method of apportionment or determination of the tax is set forth in Section 3847.27, Revised Codes of Montana, 1935. (Spec. of Error B III, V, VII, IV, X, R. 148-150.) The contention is that no method is set forth in the law to determine the gross revenue derived from operations or to apportion the interstate revenue in Montana and that outside of Montana. It is further contended that the Montana Court erred in holding that the minimum fee could be put into effect even if it be admitted that the manner of arriving at a sound basis upon which the gross revenue is determined is not provided.

The pleadings and evidence show that the revenues derived from appellant's operations in Montana would not have been sufficient to equal the minimum annual fee prescribed in the statute of $15.00 per vehicle for each vehicle operated in Montana (R. 13, 14, 15, 61, 62, 65). The answer of Mr. Matson, Secretary to the Board, as to the demand made on appellant summarized the situation when he said:

> "It is my understanding that the Board has accepted the defendant's figures in that respect, and since the ½ of 1% of the gross revenue of the operations in the State of Montana was less than the minimum, they demanded the minimum fee of $15.00 per vehicle." (R. 67.)

The determination of the correct gross revenue fee was

not involved in this case, and on the evidence could not have been, no matter how computed. Appellant's gross revenue in Montana was far short of the $3,000.00 per vehicle necessary to equal the minimum of $15.00 computed on the basis of one-half of one percent gross revenue. It was for this reason that the Montana Court said:

> "Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue (can be determined) is not provided by the statute, *a contention to which we do not agree*, no difficulty would arise in putting into effect the minimum fee of $15.00 required for each company vehicle operated within the state." (R. 115; apparent omission supplied; emphasis ours.)

Determination of the computation of gross revenue would not affect the appellant and it cannot be heard to complain that the court did not decide the exact formula or method to be used. No method of determining gross operating revenue of appellant has been required or prescribed. The question as to whether a given method would be illegal is speculative and academic and of no avail to appellant.

Stephenson v. Binford, 287 U. S. 251, 277, 53 Sup. Co. 181, 77 L. Ed. 288.

Hicklin v. Coney, supra.

On the facts, appellant would not be liable for more than the minimum fee, and it cannot set up a claim because of the uncertainty of method to compute such fees.

Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. Ed. 385.

The term "gross operating revenue" has been defined as gross operating revenue derived from operations in Montana. (R. 115.) As so defined the statute is clear and no method of determination is necessary or required in order to determine gross operating revenue in Montana. The term means all revenue received from operations in Montana. It is not to be confused with "gross receipts" or "gross business." Gross operating revenue in Montana cannot include any revenue earned in other states whereas "gross receipts" or "gross business" undoubtedly would vary from the operating revenue in Montana and might levy a tax on money actually earned outside Montana. Gross operating revenue in Montana would not be susceptible of tax by any other state.

Appellant's Specification of Error B IX, (R. 150) alleges error because the Montana Court found no method provided in the statute for ascertaining such alleged Montana revenues, i.e., "By road mileage traveled in the state, number of vehicles, road hours, cargo, volume of traffic, ton miles, vehicle miles or any other factor or combination of factors" and that the tax "could not be ascertained except by guess work."

As a matter of fact nothing so nearly represents the benefit to the carrier from use of Montana highways as "gross operating revenue." It represents wholly beneficial use and does not take into account empty mileage for the convenience of the carrier or necessary "deadhead" mileage. Likewise nothing is so susceptible to accurate mathematical determination as "gross operating revenue in Montana." All contracts for transportation and all tariffs are

susceptible to reduction to a rate per 100 pounds or per ton per mile. Given the contract, or tariffs and the classification of the shipments, the routing of the shipment—all matters of business record with the carrier—and mileage guides or maps, any company, auditor, board or court could determine the amount of operating revenue derived from operation in Montana. "Gross operating revenue" does not involve vehicle hours, vehicle miles, empty or deadhead mileage, number of vehicles, volume of traffc or any other possible non-beneficial item.

The appellant testified that in determining what the fee for various years under Section 3847.27, Revised Codes of Montana, 1935, would have amounted to, arrived:

> "at the income for that operation of the load miles operated in Montana by using an average income per mile figure based upon the probable load factor we would have had in Montana." (R. 61.)

We thus see that appellant used the same principles mentioned above in arriving at the amount of the fees payable under the act. Average figures and probable load factors would not be as accurate as actual figures on individual shipments but the principle is the same. It shows that the appellant was able to compute the tax under the statute.

No amount of definition or explanation could make the term "gross operating revenue in Montana" any clearer or plainer. No method, formula or device for determining the method of computing the tax is necessary or required, and any such attempt is and would be superfluous. The

1947 legislature amended Section 3847.27 to explain the term gross revenue in Montana. The amendment appears at page 54 of the Appendix. This amendment is not involved in this action but is set forth for the information of the Court. An analysis of the amendment shows, however, that it actually adds nothing to the plain and simple term "gross operating revenue in Montana." The amendment in more words clarifies the provision but actually neither adds nor detracts anything from the original section as interpreted by the Montana Court.

Appellees deny that the amendatory legislation confesses the validity of Aero's objections to the text of the statute. (Section 3847.27, Revised Codes of Montana, 1935, as amended by Section 2 of Chapter 73, Laws of Montana, 1947) as contended by appellant in its brief.

The amendment is merely declaratory of the intention of the legislature, and was enacted subsequent to the decision of the Supreme Court of Montana in the instant case interpreting this specific statute. It is but a legislative expression confirming the judicial interpretation as that intended by the legislature in enacting the original statute.

The rule is well established by decisions of this Court that curative or declaratory statutes are to be given great weight in the interpretation and construction of statutes. The earliest expression of this Court is that in the case of *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724, where the Court said:

> "A legislative act is to be interpreted according to the intention of the Legislature, apparent upon its

face. . . . In doubtful cases a Court should compare all parts of a statute and different statutes in pari materia to ascertain the intent of the Legislature. . . . If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; *and if it can be gathered from a subsequent statute in pari materia what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.*" (Emphasis ours.)

Such construction will relate back to the earlier statute. As was said in the case of *Cope v. Cope*, 137 U. S. 682, 688, 34 L. Ed. 834, 1-1 Sup. Ct. 224:

> "These several acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones."

In the case of *Tiger v. Western Investment Company*, 221 U. S. 286, 309, 55 L. Ed. 747, 31 Sup. Ct. 584, this Court said:

> "When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. Cope v. Cope, 137 U. S. 682, United States v. Freeman, 3 How. 556."

In the case of *Johnson v. Southern Pacific Company*, 196 U. S. 1, 21, 49 L. Ed. 394, 25 Sup. Ct. 175, this Court said:

> "As we have no doubt of the meaning of the prior law, the subsequent legislation can not be regarded

as intended to operate to destroy it. *Indeed, the latter act is affirmative, and declaratory, and, in effect, only construed and applied the former act.* Baily v. Clark, 21 Wall 284; United States v. Freeman, 3 How. 556; Cope v. Cope, 137 U. S. 682; Witmore v. Markoe, post 68. *This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived.*" (Emphasis ours.)

It is submitted that the amendatory legislation is but affirmative and declaratory of the legislative intent and but construes and applies the former act. It in no sense "confesses the validity" of appellant's objections to the act before amendment.

The Montana Supreme Court has held that the Motor Carrier Act and particularly Sections 3847.16 and 3847.27 is applicable to appellant on its interstate operations upon or over the public highways of Montana. It has held that the term "gross operating revenue" in Section 3847.27 means gross revenue derived from operations in Montana. The Motor Carrier Act must be read as though it were written to include such interpretation.

Point B.

The Interpretation of the Montana Statutes by the Supreme Court of Montana Is Binding on This Court.

The interpretation of the statutes of Montana by the Montana Supreme Court is a matter of statutory construction. The decision of the state court is final. This Court, in *Moorehead v. People of State of New York, ex rel. Tipaldo*, 298 U. S. 587, 56 Sup. Ct. 918, 80 L. Ed. 1347, said:

"This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the state. We are not at liberty to consider petitioners arguments, based on the construction repudiated by that court. The meaning of the statute as fixed by its decisions must be accepted here as if the meaning had been specifically expressed in the enactment. Supreme Lodge, Knights of Pythias v. Meyer, 265 U. S. 30, 32, 44 S. Ct. 432, 68 L. Ed. 885. Exclusive authority to enact carries with it final authority to say what the measure means. Jones v. Prairie Oil & Gas Co., 273 U. S. 195, 200, 47 S. Ct. 338, 71 L. Ed. 602. . . . As our construction of an act of Congress must be deemed to be the law of the United States, so this New York Act as construed by her court of last resort, must here be taken to express the intention and purposes of her law makers. Green v. Neal's Lessee, 6 Pet. 291, 295-298."

State of Minnesota ex rel. Pearson v. Probate Court, 309 U. S. 270, 273, 60 Sup. Ct. 523, 84 L. Ed. 744, 126 A. L. R. 530.

This Court said in *Hicklin v. Coney, supra*:

"Appellant complains of this construction of the statute as being contrary to its terms, but the question is not for us. The decision of the state court is controlling as to the meaning and extent of the statutory requirements." (Citing authorities.)

Questions of construction of state statutes are questions for decisions by state courts, and the interpretations made by the state court of last resort are binding on this Court.

Great Northern Railroad Co. v. Sunburst Oil and Refining Co., 287 U. S. 387, 53 Sup. Ct. 145, 77 L. Ed. 360.

Silas Mason Co. v. Tax Commission, 302 U. S. 186, 58 Sup. Ct. 233, 82 L. Ed. 187.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188.

Huddleston, et al. v. Dyer, 322 U. S. 232, 64 Sup. Ct. 1015, 80 L. Ed. 1246.

State of Louisiana v. Resweber, 329 U. S. 459, 67 Sup. Ct. 374, 91 L. Ed. 359.

The meaning of the Montana statute and the intent of the Montana Legislature have been determined by the Montana Court. All specifications of error raised by appellant, based on error of interpretation of the statute should be disregarded. This Court is not at liberty to interpret the Montana statutes, even though, if it were proper for it to do so, it might have arrived at a different conclusion.

Great Northern Railroad Co. v. Sunburst Oil and Refining Co., supra.

In determining whether or not the Montana statutes in question violate any provisions of the Constitution of the United States, this Court must accept the interpretation given those statutes by the Supreme Court of Montana.

Hicklin v. Coney, supra.
Huddleston, et al. v. Dyer, supra.
Richfield Oil Corporation v. State Board of Equalization, 329 U. S. 69, 61 Sup. Ct. 156, 91 L. Ed. 123.

Point C.

The Fees Prescribed by the Motor Carrier Act Are Not in Violation of the Commerce Clause of the Constitution of the United States.

In our opinion the most important federal question is whether either fee provided for in the Motor Carrier Act violates the commerce clause of the Constitution of the

United States (Art. 1, Sec. 8, Clause 3). Section 3847.16, Revised Codes of Montana, 1935, (App. 50) provides that:

> "In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of public highways of this state."

every motor carrier shall pay a fee of $10.00 per vehicle per year for each vehicle operated over or upon the highways of Montana, payable in advance of operation. Section 3847.27, Revised Codes of Montana, 1935, (App. 54) contains substantially the same statement as to purpose and fixes a fee of one-half of one percent of the gross revenue from operations in Montana, quarterly on the business of the previous quarter, subject to a minimum annual fee of $15.00 per year per vehicle for each vehicle operated on Montana highways.

A state may impose upon vehicles used exclusively in interstate commerce a fair and reasonable tax for the privilege of using its highways. Such a tax levied on interstate carriers for hire is not inconsistent with the commerce clause of the Constitution of the United States.

Hendrick v. Maryland, supra.

Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. Ed. 222.

Clark v. Poor, 274 U. S. 554, 47 Sup. Ct. 702, 71 L. Ed. 1199.

Interstate Transit, Inc., v. Lindsey, 283 U. S. 183, 51 Sup. Ct. 380, 75 L. Ed. 953.

Aero Transit Co. v. Georgia Comm., 295 U. S. 285, 55 Sup. Ct. 709, 75 L. Ed. 1439.

Morf v. Bingaman, 298 U. S. 407, 56 Sup. Ct. 756, 80 L. Ed. 1245.

Dixie Ohio Express Co. v. State Revenue Commission, 306 U. S. 72, 59 Sup. Ct. 435, 83 L. Ed. 495.

Clark v. Paul Gray, Inc., 306 U. S. 583, 59 Sup. Ct. 744, 83 L. Ed. 1001.

Union Brokerage Co. v. Jensen, 322 U. S. 202, 64 Sup. Ct. 967, 88 L. Ed. 1227, 152 A. L. R. 1072.

The Fees Are Assessed for the Use of the Highways.

The Legislature of Montana has specifically declared that the fees provided in Sections 3847.16 and 3847.27, Revised Codes of Montana, 1935, (App. 50, 54) are "in consideration of the use of the public highways of this state." This is a proper purpose for which a fee may be laid on interstate carriers, and it was so held by the Montana Court. (R. 112, 118.) Whether or not the levy is for the use of the highways may be shown by the nature of the tax, such as a mileage tax, directly proportioned to the use of the highways, by the express allocation of the revenue to highway purposes, the manner of collection or any other method which will show that purpose.

Interstate Transit Inc., v. Lindsey, supra.

Aero Mayflower Transit v. Georgia Commission, supra.

Dixie Ohio Express Co. v. State Revenue Commission, supra.

Morf v. Bingaman, supra.

Clark v. Paul Gray, Inc., supra.

There can be no more specific or affirmative declaration than that made by the legislature of Montana that the fees

are in consideration of the use of the highways. In addition Section 3847.16, Revised Codes of Montana, 1935, (App. 50) provides for a fee payable before the vehicle is operated on the highway. Such a condition is recognized as proper and as a showing that the fee assessed is for the use of the highways.

Morf v. Bingaman, supra.

Aero Mayflower Transit Co. v. State Revenue Commission, supra.

Dixie Ohio Express Co. v. State Revenue Commission, supra.

Clark v. Paul Gray, Inc., supra.

The fee assessed in Section 3847.27, Revised Codes of Montana, 1935, (App. 54) of one-half of one percent of gross revenue derived from operations in Montana is as clearly related to the use of highways as a mileage tax or a tax on the size of vehicles. It is a tax based on beneficial use of those highways. Beneficial use cannot be determined more accurately than by the amount of money received for that use. The tax, on its face, shows that it is levied for the use of the Montana highways.

Interstate Transit, Inc., v. Lindsey, supra.

Clark v. Poor, supra.

The fact that a minimum is prescribed is not injurious, as a legislative body may always specify a minimum. What has been said regarding the flat fee would generally be true in considering the effect of such a minimum.

The Use of the Money Is Immaterial.

Appellant places great reliance on the fact that none of the funds derived from the fees are used for highway purposes. Sections 3847.17 and 3847.28, Revised Codes of Montana, 1935, (App. 51, 54) provided that the fees should be placed in a fund designated as "Motor Carrier Fund" and used for the purpose of "defraying the expenses of administration of this act and the regulation of the business herein described." Thus as originally enacted the Motor Carrier Act limited the use of the funds to the expense of enforcing the act and the regulation of motor carriers. Use of funds derived from interstate carriers for such purposes is proper.

Morf v. Bingaman, supra.
Clark v. Paul Gray, Inc., supra.

In 1941 the legislature, by Chapter 14, Laws of 1941, provided that all funds received from motor carriers be placed in the General Fund of the State. (App. 55) Since that time funds for administration of the motor carrier act have been appropriated from the general fund. None of the funds have been devoted directly to highway construction or maintenance purposes. This fact is, however, immaterial. The use of funds for highway purposes is only one method of testing whether the fees are assessed for highway use. As this Court said in *Morf v. Bingaman, supra:*

> "The use for highway maintenance of a fee collected from automobile owners may be of significance, when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways."

The fees being assessed for a proper purpose, it is immaterial whether the state places the fees collected in the highway fund or in some other fund. The state builds, maintains, supervises and polices the highways which appellant uses as a place of business, and whether it uses the funds paid by appellant or other funds for highway construction and maintenance is not appellant's concern.

Clark v. Poor, supra.
Morf v. Bingaman, supra.
Dixie Ohio Express Co. v. State Revenue Commission, supra.

Appellant specifies as error the assumption of the Montana Court that the funds derived from the flat fee were exacted to build, maintain and supervise the highways of Montana and that the Court used such assumption to justify the levy (Spec. of Error A III, R. 146). This specification is apparently based on the single clause found in the concluding paragraph of the opinion (R. 119) where the Montana Court said: "The revenue collected is devoted to the building, repairing and policing of such highways." The statement contained in the first paragraph of Judge Cheadle's dissent (R. 119) is apparently based on the identical statement of the majority opinion.

An examination of the record and the opinion in its entirety will be sufficient to establish the fact that the Montana Court did not base its opinion on this statement of fact. No place in the record is there any showing of claim made by appellees that the funds were used for highway construction purposes. The position taken was that the levy was proper and the use made of the funds

was no concern of appellant. (Reply R. 50, 51.) The Montana Court had before it the statutes of Montana, and particularly Sections 3847.17, 3847.28, Revised Codes of Montana, 1935 (App. 51, 54) and Chapter 14, Laws of 1941 (App. 55) and was fully informed as to the facts. The statement of the Court shows that the contention that the fees were not used for highway purposes was before the Court. (R. 107.) This is further apparent when that Court said:

> "Again it is contended that revenue is demanded from the company to be used to pay salaries of the Board members and other alleged unlawful purposes. We think a full and complete answer to all such contentions is found in the case of Clark v. Poor. . . ." (R. 117, 118.)

It is thus apparent that the Court knew the facts and made its decisions on them. The isolated statement relied on by appellant is found in the closing paragraph which deals with the distinction between certain types of cases. In view of the plain statement of the Court quoted above, it is clear that the isolated statement was not made for the purpose of justifying the Court's decision, or to confuse or befog the issues, and was not relied upon as a fact on which to base the opinion. It was an ill-advised statement but nevertheless harmless and unimportant, either to the Supreme Court of Montana or this Court. The clause could be entirely omitted without changing in the least the actual opinion of the Montana Court.

Appellant specifies as error the misapplication of the decision of this Court in Clark v. Poor, supra; Interstate

Transit v. Lindsey, supra; and South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177, 58 Sup. Ct. 510, 82 L. Ed. 734 (Spec. of Error A VIII. (R. 147.) A study of the cases will show beyond doubt that the principles announced in those cases were applicable and correctly applied to the facts in the instant case. In *Clark v. Poor*, the state statute required the payment of fees from interstate carriers before operating on the highways of Ohio. The carrier contended that the act was in conflict with the commerce clause and likewise that the funds not being used on the highways imposed an unreasonable burden on interstate commerce. The Court outlined the rules as to when a tax could be levied on interstate commerce and upheld the state act. The Court declared that if the purpose of the levy was proper, the actual use of the money for purposes other than highways was immaterial. The Court refused to enjoin the state officials from enforcing the act. The facts in that case are nearly identical with those involved in this case.

In the *Interstate* case it is true that tax was held invalid, but the principles announced as to when a tax may be levied on interstate transportation are correct. The tax in that case was held invalid because it could not be determined that the tax was laid for the use of the highways, and thus became a privilege tax and a burden on interstate commerce. The *Barnwell* case, while it concerns the regulation of size of vehicles engaged in interstate traffic, contains a review of the previous declarations of this Court. The right of the state to levy taxes, fix regulations and control operations of interstate vehicles is reaffirmed, so

long as such regulation is non-discriminatory, reasonable and proper for the promotion of safety, or a levy for the use of the highways. Nothing said by this Court in any of these cases is contrary to the opinion of the Montana Court in this case. The principles announced were applied by the Montana Court.

Appellant apparently contends that because the money derived from the fees in the Montana statutes is not actually used for highway purposes, it is not a fee for the use of the highways and therefore becomes an occupation or privilege tax. This, of course, is not correct and the cases relating to occupation and privilege taxes are not applicable to the facts now before the Court. This Court has recently outlined the limits of taxation or regulation of interstate commerce. The principles announced in *Hendrick v. Maryland, supra*, and *Dixie Ohio Express Co. v. Revenue Commission, supra*, that a state may levy a fair and reasonable tax applicable to interstate commerce, for the use of its highways, so long as it is fixed by some uniform, fair and practical manner is recognized and reaffirmed.

Freeman v. Hewett, 329 U. S. 249, 67 Sup. Ct. 274, 91 L. Ed. 205.

Union Brokerage Co. v. Jensen, supra.

Congress, when it enacted the Motor Carrier Act, provided that nothing in the act shall be construed to affect the power of taxation of the several states (49 U. S. C. A. 302 B). The federal motor carrier act was enacted in 1935 after the passage of the Montana Act. Because of the specific statement of Congress that the right of taxation by the states is not affected, the states have the same

right of taxation as before the passage of the federal act. The nature and purpose of the taxes which may be levied on interstate carriers by the states, without violating the commerce clause, has been fully determined by this Court. The taxes involved in the instant case are within the limits defined as proper.

The Fees Are Not Unreasonable.

It is of course recognized that any tax on regulation of interstate carriers involves a burden on such commerce. So long as the state action does not impose an unreasonable burden and does not discriminate against interstate commerce, the burden is one which the Constitution of the United States permits.

> *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 58 Sup. Ct. 510, 82 L. Ed. 734.

The fee involved in Aero Mayflower Transit Co. v. Georgia Comm., supra, was a flat fee of $25.00 per vehicle on carriers for hire in Georgia. The fee in the Dixie Ohio Express Co. v. State Revenue Comm., supra, was a minimum flat fee of $50.00 per vehicle on vehicles transporting for hire in Georgia and is in addition to the fee considered in the Aero case. These fees and the fees considered in other cases were payable before the vehicles were operated in the states. The flat fee in the instant case is $10.00 per vehicle. (Section 3847.16, App. 50) The gross revenue fee (Section 3847.27, App. 54) considered as a minimum fee is $15.00 per vehicle for contract or Class C carriers, such as appellant. For the minimum fee of

$25.00 per vehicle per year the appellant can do business returning an average of $3,000.00 per vehicle for operations on Montana highways. If the business exceeds the $3,000.00 per vehicle the additional fee for appellant would amount to one-half of one percent of the gross revenue in excess of that amount received from operations on Montana highways. Similar or greater fees have been sustained by this Court and have been declared not to be an unreasonable or forbidden burden on interstate commerce.

Kane v. New Jersey, supra.
Clark v. Poor, supra.
Aero Transit Co. v. Georgia Comm., supra.
Morf v. Bingaman, supra.
Dixie Ohio Express Co. v. State Revenue Comm., supra.

The appellant cannot challenge the reasonableness of the fees because it does not make the use of the highways permitted by the fees exacted. The flat fee of $10.00 is made without limitation of the use of the highways. The gross revenue fee, until the revenue on Montana highways equals an amount sufficient so that the percentage will equal the minimum, is a tax of the same nature. This Court has said, in *Aero Transit v. Georgia Comm., supra:*

> "The fee is for the privilege for a use as extensive as the carrier wills that it shall be. . . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may."

Kane v. New Jersey, supra.
Clark v. Poor, supra.
Hicklin v. Coney, supra.
Morf v. Bingaman, supra.

After the revenue of the carrier is sufficient so that the percentage tax on gross revenue equals or exceeds the minimum fees there can be no question that the gross revenue tax is related to the beneficial use made of the highways of Montana. (R. 117.) There is no showing in the record that either fee prescribed is unreasonable in amount. The Montana Court followed the rules laid down by this Court that the burden is on the carrier to show wherein the exactions are unlawful to him. (R. 113.)

Hendrick v. Maryland, supra.
Kane v. New Jersey, supra.
Morf v. Bingaman, supra.
Dixie Ohio Express Co. v. State Revenue Comm., supra.
Clark v. Paul Gray, Inc., supra.

Neither fee involved in the case at bar is unreasonable in amount and does not prohibit interstate commerce. The fees are levied for a proper purpose. This being true, the amount of the charges and method of determination are matters for state determination. This principle was followed by the Montana Court (R. 112, 117). This Court, in *South Carolina State Highway Department v. Barnwell Bros., supra*, said:

> "When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for

the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. Jacobson v. Massachusetts, 197 U. S. 11, 30; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365; Price v. Illinois, 238 U. S. 446, 451; Hadacheck v. Sebastain, 239 U. S. 394, 408-414; Thomas Cusack Co. v. Chicago, 242 U. S. 526, 530; Euclid v. Ambler Realty Co., 272 U. S. 365, 388; Zahn v. Board of Public Works, 274 U. S. 325, 328; Standard Oil Co. v. Marysville, 279 U. S. 582, 584. This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. Morris v. Duby, supra, 143; Sproles v. Binford, supra, 389, 390; Minnesota Rate Cases, supra, 399, 400; Smith v. St. Louis & S. W. R. Co., 181 U. S. 248, 257; Reid v. Colorado, 187 U. S. 137, 152; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 42, 43."

Travelers Ins. Co. v. Conn., 185 U. S. 364, 22 Sup. Ct. 673, 46 L. Ed. 949.

Dixie Ohio Express Co. v. State Revenue Comm., *supra*, and cases cited.

Neither the flat fee of $10.00 per vehicle per year prescribed in Section 3847.16, Revised Codes of Montana, 1935, (App. 50) nor the gross revenue fee in Section 3847.27, Revised Codes of Montana, 1935, (App. 54) derived from operations on Montana highways measured by percentage and subjected to an annual minimum fee per vehicle, is unreasonable in amount. Neither fee prohibits interstate commerce or constitutes a burden forbidden by the commerce clause of the Constitution of the United States.

The Question of Apportionment of Interstate and Interstate Revenue Is Not Involved or Material.

Appellant contends that the gross revenue fee statute (Section 3847.27, Revised Codes of Montana, 1935, App. 54) violates the commerce clause because no method of apportionment of the gross revenue derived from operations in Montana and gross revenue elsewhere is given or established. They also contend that being engaged solely in interstate commerce there is no business done in Montana and the tax is actually a tax on interstate commerce.

We have previously considered the decision of the Montana Supreme Court that gross operating revenue means gross revenue derived from operations in Montana. We have shown also that gross operating revenue means the revenue received by the company for business done on Montana highways. It makes no difference where the money is paid, or that the shipment is entirely interstate as the tax is on revenue received for operations over Montana highways. When a charge is made for transportation over Montana highways, there is operating revenue from t at operation. Appellant confuses gross receipts or gross income and gross revenue derived from operations over Montana highways.

Appellant's contention that the act is unconstitutional because it taxes revenue without apportionment between interstate and inrastate revenue is apparently based on the false premise that the tax is not charged as compensation for the use of the highways. We have already shown that the tax is assessed for use of the highways

and is a proper tax under the decisions of this Court. Because the money received is not directly used for highway work, appellant contends that it is not charged for the use of the highway, but is in the nature of occupation or gross business tax. *Adams Mfg. Co. v. Stoner*, 304 U. S. 307, 58 Sup. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429; *Western Livestock v. Bureau of Revenue*, 303 U. S. 250, 58 Sup. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944; *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 59 Sup. Ct. 325, 83 L. Ed. 272; *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U. S. 384, 55 Sup. Ct. 477, 79 L. Ed. 934; and similar cases are relied on as authority for the fact that a tax cannot be levied on interstate commerce and that where there is not a fair apportionment between revenue derived from interstate and intrastate business an act is invalid. An examination of these cases shows that they do not involve fees as compensation for use of highways and that they are not applicable to the facts presented here. As has been pointed out above a fair and reasonable tax as compensation for use of its highways may be levied by a state, even on interstate carriers. The applicable principles to the case at bar are stated in *Dixie Ohio Express Co. v. Revenue Comm., supra*, when it is stated:

> "It is elementary that a state may not impose a tax on the privilege of engaging in interstate commerce. (citing authorities.) But, consistently with the commerce clause, a state may impose upon vehicles *used exclusively for interstate commerce transportation* a fair and reasonable tax as compensation for the privilege of using its highways for that purpose. . . . The amount of the charges and the method of collections are primarily for determination by the state itself; and so long as they are reasonable

and are fixed according to some uniform, fair and practical standard, *they constitute no burden on interstate commerce.* (citing authorities.) While ordinarily state action is deemed valid unless the contrary appears, we have held that to sustain a charge for *the use or privilege of using its roads for interstate transportation*, it must *affirmatively appear that the charge is exacted as compensation*, or to pay the cost of policing its highways. (citing authorities.)" (Emphasis ours.)

Clark v. Poor, supra.
Aero Transit Co. v. Georgia Comm., supra.
Morf v. Bingaman, supra.

Whether the tax is on mileage traveled or revenue received from operations on Montana highways, or a flat fee on vehicles, or some other method, is immaterial. The principle is the same, so long as the tax is fair, reasonable and non-discriminatory and for a proper purpose, the amount of the charges and method of collection are matters primarily for the determination of the legislative branch of the state government.

Travelers Inc. Co. v. Conn., supra.
Dixie Ohio Express Co. v. Revenue Comm., supra.
South Carolina Highway Dept. v. Barnwell Bros., supra.

The Montana Court was right in holding that these sections were applicable to appellant and that it should be enjoined from operations in Montana until it complied with the law applicable (R. 119).

Interstate commerce cannot be prevented or unduly hampered by discriminatory legislation, but one desiring

to engage in such commerce must comply with reasonable laws providing for regulation or taxation, not in violation of the United States Constitution or statutes, by the states in which he operates. If he fails to comply with such laws, injunction is a proper remedy to insure against operation in violation of the law. The order of the Court will be complied with when appellant complies with the applicable statutes.

Point D.

The Fees Exacted by the Montana Statutes Do Not Violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment.

The fees prescribed by Sections 3847.16 and 3847.27, Revised Codes of Montana, 1935, (App. 50, 54) are applied alike to the business of the intrastate carrier and the business of the interstate carrier in Montana. They are fixed according to a uniform, fair and practical standard. The Montana Act is not hostile to interstate commerce and as the Montana Court rightly held.

Travelers Ins. Co. v. Conn., supra.

South Carolina State Highway Comm. v. Barnwell Bros., supra.

Dixie Ohio Express Co. v. State Revenue Comm., supra.

The contention of discrimination against interstate carrier can only be justified if the gross revenue fee were applicable to income or revenue not earned on Montana highways. The Montana Court has decided that the gross revenue to be considered in computing the tax under section 3847.27 is revenue derived from operations in Mon-

tana. (R. 115.) The argument of discrimination falls within the determination of the Montana Court. The appellant is required to pay the identical fee which purely intrastate carriers pay. No other state can levy a tax on the same revenue. The fees levied do not offend against the Fourteenth Amendment to the Constitution of the United States. A tax on revenue from business done over highways of other states would, of course, be invalid. Likewise a tax will not be sustained if a similar tax could be laid on the same revenue by one or more additional states. The tax in this case is only for the privilege granted for the use of Montana highways. The gross revenue fee is applicable only to revenue derived from operations on Montana highways. While other states may tax appellant for the use made of their highways in some appropriate manner, the tax cannot be levied on the revenue derived from operations on Montana highways or the privilege granted for use of those highways. All danger of double taxation is avoided.

Western Livestock v. Bureau of Revenue, supra.

The contention that the Montana Act requiring the payment of additional taxes by carriers for hire is repugnant to the equal protection clause of the Fourteenth Amendment is without merit. The same or similar taxes have been sustained against objections that they violate the Fourteenth Amendment of the United States Constitution.

Kane v. New Jersey, supra.

Dixie Ohio Express Co. v. Revenue Comm., supra.

Clark v. Paul Gray, Inc., supra.

The interstate carrier can obtain from the appellee Board right to engage in the business authorized by the Interstate Commerce Commission on Montana highways as a matter of right, and without proof of public convenience or necessity. (Section 3847.23, Revised Codes of Montana, 1935, App. 53) After obtaining such right, the interstate carrier is subject to the same regulations and fees as the intrastate carrier, for the identical class of operations over the highways of Montana, nothing more, nothing less. As the Montana Court held, (R. 114, 117) there is no showing of discrimination or hostility to interstate commerce. If the taxes do not constitute an unreasonable or forbidden burden on interstate commerce, under the commerce clause, (Article 1, Section 8, Clause 3, U. S. Const.), and we do not believe they do, do not discriminate against the interstate carrier or forbid it the right to engage in such service in violation of the Fourteenth Amendment to the Constitution of the United States, they may be forced against the interstate carrier.

Travelers Ins. Co. v. Conn., supra.
Kane v. New Jersey, supra.
Clark v. Poor, supra.
Aero Transit Co. v. Georgia Comm., supra.
South Carolina Highway Dept. v. Barnwell Bros., supra.
Western Livestock v. Bureau of Revenue, supra.
Dixie Ohio Express Co. v. Revenue Comm., supra.
Clark v. Paul Gray, inc., supra.

Numerous cases cited by appellant relate to the application of occupation taxes, use taxes, or inspection taxes

of transportation agencies or utilities applied to interstate commerce. Those cases are not applicable and have not been discussed in detail. In none of the cases of that type is the fee charged as compensation for the use of a facility such as highways, owned, constructed and maintained by the state as a place on which to conduct a business. A reasonable and fair tax as compensation for the use of the highways is not considered a forbidden burden on interstate commerce. This distinction was recognized by the Supreme Court of Montana (R. 118).

Montana Highway License Fees Are Not Involved.

Appellant seeks to show by argument that the taxes here involved cannot be considered as "in lieu of ad valorem taxes" on its trucks. It is argued that its trucks are subject to the same ad valorem taxes as are trucks used entirely intrastate. Section 1759, Revised Codes of Montana, 1935, as amended by Chapter 72, Laws of Montana, 1937, and Section 1760.7, Revised Codes of Montana, 1935, as amended by Chapter 296, Laws of Montana, 1947, are cited in substantiation of its argument.

A reading of these statutes clearly shows their inapplicability and immateriality to the questions at issue here. For the information and guidance of the Court, Section 1760.7, supra, is appended. (App. 57)

Section 1760.7, Revised Codes of Montana, 1935, as amended by Chapter 296, Laws of Montana, 1947, is a reciprocity act and clearly provides in part:

> "... that the registrar of motor vehicles is authorized and empowered to enter into reciprocal

agreements with any country, state or territory, exempting from registration and licensing in Montana *the foreign licensed* motor vehicles; trailer or semi-trailer of a resident of such country, state or territory when lawfully registered and licensed therein, when the laws of such country, state or territory extend the same privilege to, or authorize like reciprocal agreements with respect to, motor vehicles, trailers and semi-trailers registered and licensed in the state of Montana and operated by a resident of this state upon the highways of such country, state or territory . . ." (Emphasis ours.)

By this language it is clear as to foreign owned motor vehicles, it was not intended that the license fees and taxes provided by these statutes were not to be compensation for use of highways by for-hire carriers.

CONCLUSION

It is therefore respectfully submitted that the decision of the Montana Supreme Court, that fees prescribed by the Motor Carrier Act are applicable to interstate carriers for their operations on Montana highways, and that the gross revenue fees are payable on gross revenue derived from operations on Montana highways, is a correct interpretation of the Montana statutes. In any event, the decision of the highest court of the state is in the interpretation of state statutes final and binding on this Court. We submit that the fees prescribed by the Montana Motor Carrier Act are levied for the proper purpose of compensation for the use of the highways, are fair, reasonable and non-discriminatory, and their application to interstate carriers does not constitute a forbidden burden on interstate com-

merce, in violation of the commerce clause, or violate the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The decision of the Supreme Court of Montana correctly applies the principles firmly established by this Court in holding the fees prescribed by Montana statutes, applicable to the operations of appellant, and the decision should be affirmed.

Respectfully submitted,

R. V. BOTTOMLY,
Attorney General of the State of Montana.

EDWIN S. BOOTH,
Secretary-Counsel of Board of Railroad Commissioners of the State of Montana.

CLARENCE HANLEY,
Assistant Attorney General of the State of Montana.

Attorneys for Plaintiffs and Appellees, Board of Railroad Commissioners of the State of Montana.

APPENDIX

STATUTES

SECTION 3847.16, REVISED CODES OF MONTANA, 1935 (being also Section 16, Chapter 184, Laws of the Twenty-Second Legislative Assembly of the State of Montana, 1931):

"Annual Fee for Motor Carriers—Fee for Seasonal Operators—Compliance Required of Motor Carriers Operating in More Than One State—Revocation of Certificate for Failure to Pay Fees—Lien of Fees and Charges.

"(a) In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of the public highways of this state, every motor carrier, as defined in this act, shall, at the time of the issuance of a certificate and annually thereafter, on or between the first day of July and the fifteenth day of July, of each calendar year, pay to the board of railroad commissioners of the state of Montana the sum of ten dollars ($10.00), for every motor vehicle operated by the carrier over or upon the public highways of this state.

"Provided, that a motor carrier engaged in seasonal operations only, where its said operations do not extend continuously over a period of not to exceed six (6) months in any calendar year, shall only be required to pay compensation and fees in a sum equal to one-half (½) of the compensation and fees herein provided, and, provided further, that the compensation and fees herein imposed shall not apply to motor vehicles maintained and used by a motor carrier as standby or emergency equipment. The board shall have the power and it is hereby made its duty to determine what motor vehicles shall be classed as standby or emergency equipment.

"(b) When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements

herein required and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state.

"(c) Upon the failure of any motor carrier to pay such compensation, when due, the board may in its discretion revoke the carrier's certificate or privilege and no carrier whose certificate or privilege is so revoked shall again be authorized to conduct such business until such compensation shall be paid.

"(d) All compensation, fees, or charges, imposed and accruing under the provisions of this act, shall be a lien upon all property of the motor carrier used in its operations under this act; said lien shall attach at the time the compensation, fees, or charges become due and payable, and shall have the effect of an execution duly levied on such property of the motor carrier and shall so remain until said compensation, fees, or charges are paid or the property sold for the payment thereof."

SECTION 3847.17, REVISED CODES OF MONTANA, 1935 (being also Section 17, Chapter 184, Laws of the Twenty-Second Legislative Assembly of the State of Montana, 1931):

"Motor Carrier Fund — Composition — Use. All of the fees and compensation charges collected by the board under the provisions of this act shall be transmitted to the state treasurer who shall place the same to the credit of a special fund designated as 'motor carrier fund;' such fund shall be available for the purpose of defraying the expenses of administration of this act and the regulation of the business herein described, and shall be cumulative from year to year. All expenses of whatsoever kind or nature of the board incurred in carrying out the provisions of this act shall be audited by the state board of examiners and paid out of the 'motor carrier fund.' Such fund shall not come within the restriction of any law of this state governing payment of expense incurred in a pre-

vious year, it being intended that such fund shall be applied to the payment of any necessary costs or expenses in carrying out the provisions of this act, whether incurred during the ensuing year or previous fiscal years, and such 'motor carrier fund' or accumulations thereof, are hereby appropriated for the payment of the costs and expenses rendered necessary in the carrying out of the provisions of this act." (This section is repealed by Chapter 14, Laws of the Twenty-Seventh Legislative Assembly, 1941.)

SECTION 3847.18, REVISED CODES OF MONTANA, 1935 (being also Section 18, Chapter 184, Laws of the Twenty-Second Legislative Assembly of the State of Montana, 1931):

"Records of Motor Carriers to be Open for Inspecial by Board — System of Accounts to be Prescribed — Reports Required. All records, books, accounts and files of every class A and B motor carrier in this state, so far as the same shall relate to the business of transportation conducted by such motor carrier, shall at all times be subject to examination by the board or by any authorized agent or employee of the board. The board shall prescribe a uniform system of accounts and uniform reports covering the operations of such class A and class B motor carriers and every motor carrier authorized to operate as such in accordance with the provisions of this act shall keep its records, books, and accounts according to such uniform system, insofar as possible. On or before the fifteenth day of July of each year, every motor carrier authorized to engage in such business shall file with the board a report, under oath. In addition to such annual reports every motor carrier shall prepare and file with the board, at the time or times and in the form to be prescribed by the board, annual reports, special reports and statements giving to the board such information as it shall require in order to perform its duties under this act."

SECTION 3847.23, REVISED CODES OF MONTANA, 1935 (being also Section 16, Chapter 184, Laws of the Twenty-Second Legislative Assembly of the State of Montana, 1931):

"Application of Act to Interstate Carriers and Motor Carriers Operating in National Parks. The terms and provisions of this act shall apply to commerce with foreign nations, and to commerce among the several states of this Union, insofar as such application may be permitted under the provisions of the constitution of the United States, treaties made thereunder and the acts of Congress; provided that it shall not be necessary for an interstate or international motor carrier, in order to obtain a permit as herein provided, to make any showing of public convenience and necessity; except as to the transportation of passengers and/or freight between points within this state, the power to regulate such operation being specifically reserved herein; and provided further, the board is hereby authorized to exercise any additional power that may from time to time be conferred upon the state by any act of Congress, and provided further, that any motor carrier operating in and about any national park, whose rates and methods of accounting are controlled by contract with the United States, shall not be subject to any regulation by the commission in conflict with such contract or in conflict with any regulation by the United States made pursuant to such contract or made pursuant to an act of Congress of the United States."

SECTION 3847.24, REVISED CODES OF MONTANA, 1935 (being also Section 16, Chapter 184, Laws of the Twenty-Second Legislative Assembly of the State of Montana, 1931):

"Invalidity of Part of Act Not to Affect Remainder. If any section, subsection, sentence, clause or phrase of this act is for any reason held unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislative assembly declares that it would have passed this act and each section, subsection, sentence, clause and phrase irrespective of the fact that

one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional."

SECTION 3847.27, REVISED CODES OF MONTANA, 1935 (being also Section 2, Chapter 108, Laws of the Twenty-Fourth Legislative Assembly of the State of Montana, 1935):

"Additional Fees Governing Motor Carriers. In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall between the first and fifteenth days of January, April, July and October of each year, file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one percent of the amount of such gross operating revenue; provided, however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars. ($30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars ($15.00)."

SECTION 3847.28, REVISED CODES OF MONTANA, 1935 (being also Section 3, Chapter 100, Laws of the Twenty-Fourth Legislative Assembly of the State of Montana, 1935):

"Disposition Made of Fees. All fees collected from motor carriers shall be, by the commission, paid into the state treasury and shall be, by the state treasurer, placed to the credit of the motor carrier fund. All other fees and charges collected by the commission under the provisions of this act shall be by the commission paid into the state treasury and shall be by the state treasurer placed to the credit of a fund to be known as the 'public service commission fund,' and the general and contingent expenses

of the public service commission shall be by the state treasurer paid out of said public service commission fund upon presentation of duly verified claims therefor, which claims shall have been approved by the commission and audited by the state board of examiners."

SESSION LAWS

SECTION 2, CHAPTER 14, LAWS OF THE TWENTY-SEVENTH LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA, 1941:

"That all moneys collected or received by or paid over to the board of railroad commissioners of Montana, public service commission of Montana, state board of health, milk control board, state auditor and insurance commissioner ex-officio, under the provisions of Section 2761, Revised Codes of Montana, 1935, department of agriculture, labor and industry, or any of the bureau, divisions, officers or employees of any thereof, and to the state examiner and state forester, by way or on account of fees, licenses, or for any other purpose, on and after July 1, 1941, shall be paid over to the state treasurer who shall deposit the same to the credit of the general fund of the State."

SECTION 10, CHAPTER 14, LAWS OF THE TWENTY-SEVENTH LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA, 1941:

"That sections 2295.28, 2303.12, 2355.9, 2408.9, 2815.157, 3645, 10400.44, 10400.49, Revised Codes of Montana, 1935, Section 29, Chapter 84, Section 7 of Chapter 91; Subsection 1 of Section 11 of Chapter 87, Section 9 of Chapter 94, Section 11 of Chapter 199 and Section 7 of Chapter 201 Session Laws of Montana, 1937, and all other acts and parts of acts in conflict herewith are hereby repealed; it being the purpose and intent of this act that the licenses, fees, taxes and revenues specifically enumerated and described in Sections 1, 2 and 3 of this act shall be deposited by the state treasurer to the credit of the state general fund and that no money shall be drawn from such fund but in pursuance of specific appropriations made

by law, in conformity with the provisions of Section 10 of Article XII of the Constitution of the State of Montana." (This and the preceding section repeal Sections 3847.17 and 3847.28, Revised Codes of Montana, 1935, set forth above.)

SECTION 2, CHAPTER 73, LAWS OF THE THIRTIETH LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA, 1947:

"That Section 3847.27, of the Revised Codes of Montana of 1935 be, and the same is hereby amended to read as follows:

"3847.27. Additional Fees Covering Motor Carriers. In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity ~~or permit~~ issued by the *Board of Railroad Commissioners*, shall between the first and fifteenth days of January, April, July and October of each year, file with the *Board of Railroad Commissioners* a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one per cent of the amount of such gross operating revenue; *and in the event that such carrier operates in interstate commerce, the gross operating revenue of such carrier within this state shall be deemed to be all the revenue received from businss beginning and ending within this state, and a proportion based upon the proportion of the mileage within this state to the entire mileage over which the business is done of revenue on all business passing through, into or out of this state;* provided, however, that the minimum fee which shall be paid by each class A and class B carrier for each vehicle registered and or operated under the provisions of the motor carrier act shall be thirty dollars ($30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and or operated under the motor carrier act shall be fifteen dollars ($15.00)." (The emphasized portions in the

above section designate the words added or changed by the amendment.)

SECTION 2, CHAPTER 296, LAWS OF THE THIRTIETH LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA, 1947:

"Section 1. Section 1760.7 Revised Codes of Montana, 1935, as amended by Chapter 93, Laws of the twenty-sixth legislative assembly of Montana, 1939, shall be, and the same is hereby amended to read as follows:

"Section 1760.7. Foreign Vehicles Used in Gainful Occupation — Registrar of Motor Vehicles May Make Reciprocal Agreements to Exempt. Before any foreign licensed motor vehicle shall be operated on the highways of this state for hire, compensation or profit, or before the owner thereof uses the vehicle while engaged in gainful occupation or business enterprise, in the State of Montana, including highway work, the owner of such vehicle shall make application to a county treasurer for registration, upon an application form furnished by the registrar of motor vehicles. Upon satisfactory evidence of ownership submitted to such county treasurer, the treasurer shall accept the application for registration and shall collect the regular license fee required for the vehicle. The treasurer shall thereupon forward to the registrar of motor vehicles such application form. The treasurer shall at the same time issue to the applicant the proper license plates or other identification markers, which shall at all times be displayed upon such vehicle, when operated or driven upon roads and highways of this state, during the period of the life of such license. Upon receipt of the application for registration, the registrar of motor vehicles shall issue to the owner of the vehicle a registration receipt. This registration receipt shall not constitute evidence of ownership, but shall only be used for registration purposes. No Montana certificate of title shall be issued for this type of registration, providing, however, that the registrar of motor vehicles is authorized and empowered to enter into reciprocal agreements with any country, state or territory, exempting from registration and licensing in Montana the foreign licensed motor vehicle, trailer or

semi-trailer of a resident of such country, state or territory when lawfully registered and licensed therein, when the laws of such country, state or territory extend the same privilege to, or authorize like reciprocal agreements with respect to motor vehicles, trailers and semi-trailers registered and licensed in the State of Montana and operated by a resident of this state upon the highways of such country, state or territory; provided, however, that this act shall not be construed to permit any owner of a motor vehicle who is a resident of the State of Montana, or any owner or operator of a motor vehicle whose motor vehicle operations are carried on principally within the State of Montana, registering and licensing such vehicle in any such country, or state or territory, and operating said foreign registered and licensed vehicle on the highways of Montana bearing such foreign license, under the terms of any such agreement. If any Montana resident owner, or operator of any motor vehicle, as above stated, shall attempt or accomplish such prohibited registration or licensing, he shall be guilty of a misdemeanor, and upon conviction thereof any motor vehicles by him owned shall not thereafter be registered or licensed by the registrar of motor vehicles of the State of Montana, and any operations with said vehicles over the highways of this state shall be enjoined upon complaint of any county attorney of any county of this state."

SUPREME COURT OF THE UNITED STATES

No. 39.—October Term, 1947.

Aero Mayflower Transit Company, Appellant, v. Board of Railroad Commissioners of the State of Montana, et al.	Appeal From the Supreme Court of the State of Montana.

[December 8, 1947.]

Mr. Justice Rutledge delivered the opinion of the Court.

Again we are asked to decide whether state taxes as applied to an interstate motor carrier run afoul of the commerce clause, Art. I, § 8, of the Federal Constitution.

Two distinct Montana levies are questioned. Both are imposed by that state's Motor Carriers Act, Rev. Codes Mont. (1935) §§ 3847.1–3847.28. One is a flat tax of $10 for each vehicle operated by a motor carrier over the state's highways, payable on issuance of a certificate or permit, which must be secured before operations begin, and annually thereafter. § 3847.16 (a).[1] The other is a quarterly fee of one-half of one per cent of the motor carrier's "gross operating revenue," but with a minimum annual fee of $15 per vehicle for class C carriers, in which

[1] The section was enacted originally as Mont. Laws, 1931, c. 184, § 16. Textually it is as follows: "(a) In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of the public highways of this state, every motor carrier, as defined in this act, shall, at the time of the issuance of a certificate and annually thereafter, on or between the first day of July and the fifteenth day of July, of each calendar year, pay to the board of railroad commissioners of the state of Montana the sum of ten dollars ($10.00), for every motor vehicle operated by the carrier over or upon the public highways of this state . . . ." In further relation to issuance of the permit, see note 5.

group appellant falls. § 3847.27.[2] Each tax is declared expressly to be laid "in consideration of the use of the highways of this state" and to be "in addition to all other licenses, fees and taxes imposed upon motor vehicles in this state."

Prior to July 1, 1941, the fees collected pursuant to §§ 3847.16 (a) and 3847.27 were paid into the state treasury and credited to "the motor carrier fund."[3] After that date, by virtue of Mont. Laws, 1941, c. 14, § 2, they were allocated to the state's general fund.

Appellant is a Kentucky corporation, with its principal offices in Indianapolis, Indiana. Its business is exclusively interstate. It consists in transporting household goods and office furniture from points in one state to destinations in another. Appellant does no intrastate

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[2] This section originally was Mont. Laws, 1935, c. 100, § 2. It reads as follows: "In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall between the first and fifteenth days of January, April, July and October of each year, file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one percent of the amount of such gross operating revenue; provided, however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars ($30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars ($15.00)."

Section 3847.2, Rev. Codes Mont. (1935), contains the definitions of the three classes of carriers.

[3] The moneys in the motor carrier fund were subject to appropriation for use in supervision and regulation of many activities other than those connected with the public highways. See Rev. Codes Mont. (1935), §§ 3847.17, 3847.28; and cf. note 15.

business in Montana. The volume of its interstate business there is continuous and substantial, not merely casual or occasional.[4] It holds a certificate of convenience and necessity issued by the Interstate Commerce Commission, pursuant to which its business in Montana and elsewhere is conducted.

In 1935 appellant received a class C permit to operate over Montana highways, as required by state law.[5] Until 1937, apparently, it complied with Montana requirements, including the payment of registration and license plate fees for its vehicles operating in Montana and of the 5¢ per gallon tax on gasoline purchased there.[6] However, in 1937 and thereafter appellant refused to pay the flat $10 fee imposed by § 3847.16 (a) and the $15 minimum "gross revenue" tax laid by § 3847.27. In consequence, after hearing on order to show cause, the appellee board[7] in 1939 revoked the 1935 permit and brought

[4] Appellant's answer and cross-complaint set forth statistics concerning its use of Montana highways during the years 1937, 1938 and 1939. The figures show appellant's equipment operating on Montana highways during 227 days in 1937; 385 trucking days in 1938; and 405 trucking days in 1939. See also note 6.

[5] The statute was Mont. Laws, 1931, c. 184, § 23, now Rev. Codes Mont. (1935), § 3847.23. The section applied the act of which it was a part to interstate and foreign commerce "insofar as such application may be permitted under the provisions of" the Federal Constitution, treaties and acts of Congress, but expressly exempted interstate carriers from making "any showing of public convenience and necessity" in order to secure the certificate or permit.

[6] These taxes were imposed separately from the two involved in this case. Appellant's brief states the registration and license plate fees increased from $660.50 in 1937 to $1,212.50 in 1938 and to $1,630.50 in 1939. The gasoline tax increased from $745.30 in 1937 to $1,257.90 in 1938 and $1,649.98 in 1939. The gallonage tax, though ultimately borne by the consumer, was laid on the sale and collected from the dealer.

[7] It should be noted that "the board of railroad commissioners," as used in § 3847.16 (a), and "the public service commission," as used in § 3847.27, designate a single body, invested with regulatory power

this suit in a state court to enjoin appellant from further operations in Montana.

Upon appellant's cross-complaint, the trial court issued an order restraining the board from enforcing the "gross revenue" tax laid by § 3847.27. But at the same time it enjoined appellant from operating in Montana until it paid the fees imposed by § 3847.16 (a). On appeal the state supreme court held both taxes applicable to interstate as well as intrastate motor carriers and construed the term "gross operating revenue" in § 3847.27 to mean "gross revenue derived from operations in Montana."[8] It then sustained both taxes as against appellant's constitutional objections, state and federal. Accordingly, it reversed the trial court's judgment insofar as the "gross revenue" tax had been held invalid, but affirmed the decision relating to the flat $10 tax. — Mont. —, 172 P. 2d 452.

We put aside at the start appellant's suggestion that the Supreme Court of Montana has misconstrued the state statutes and therefore that we should consider them, for purposes of our limited function, according to appellant's view of their literal import. The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes by the state courts.[9] Accordingly, we ac-

over various public utilities in addition to motor carriers, *e. g.*, railroads, common carriers of oil, etc. By Rev. Codes Mont. (1935), § 3880, "The board of railroad commissioners . . . shall be ex officio the public service commission hereby created . . ." The two terms were said by the Montana Supreme Court in this case to be "used interchangeably." — Mont. —, —, 172 P. 2d 452, 461.

[8] This judicial construction was embodied in an amendment to the section made by Mont. Laws, 1947, c. 73, § 2.

[9] *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459; *Huddleston* v. *Dwyer*, 322 U. S. 232; *Minnesota* v. *Probate Court*, 309 U. S. 270; *Morehead* v. *N. Y. ex rel. Tipaldo*, 298 U. S. 587; cf. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

cept the state court's rulings, insofar as they are material, that the two sections apply alike to interstate and intrastate commerce and that "gross operating revenue" as employed in § 3847.27 comprehends only such revenue derived from appellant's operations within Montana, not outside that state.[10]

Moreover, since Montana has not demanded or sought to enforce payment by appellant of more than the flat $15 minimum fee for class C carriers under § 3847.27,[11] we limit our consideration of the so-called "gross revenue" tax to that fee. This too is in accordance with the state supreme court's declaration: "Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue [should be calculated] is not provided by the statute, a contention to which we do not agree, no difficulty would arise in putting into effect

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[10] Acting not only in the view that statutes are presumptively constitutional and, if necessary, are to be so construed as to make them so, the court noted that § 3847.16 (b) expressly provides that, when service "is rendered partly in this state and partly in an adjoining state or foreign country," carriers "shall comply with *the provisions of this act*" concerning "payment of compensation" and making reports by showing "the total business performed *within the limits of this state*." (Emphasis added.) Accordingly it held that §§ 3847.27 and 3847.16 should be read together and the limitation of § 3847.16 (b) "within the limits of this state" thus became a part of § 3847.27 as well as § 3847.16 (a). — Mont. —, —, 172 P. 2d 452, 460.

[11] Appellant's vice president and general manager, Wheating, testified that for purposes of applying § 3847.27 he had calculated, for each of the years 1939 through 1942, "the [gross] income for that operation of the load miles operated *in Montana* by using an average income per mile figure based upon the probable load factor we would have had in Montana." (Emphasis added.) On this basis the amount of the tax as calculated at one-half of one per cent quarterly was substantially below the statutory minimum for each of the four years. See note 19. These figures apparently were reported to and accepted by the board as the basis for its demands upon the taxpayer for the flat $15 minimum annual tax.

the minimum fee of $15.00 required for each company vehicle operated within the state." [12] Although the state court did not concede that the statute comprehended no workable or sound basis for calculating the tax above the minimum, we take this statement as a clear declaration that it would sustain the minimum charge even if for some reason the amount of the tax above the minimum would have to fall.

With the issues thus narrowed, we have, in effect, two flat taxes, one for $10, the other for $15, payable annually upon each vehicle operated on Montana highways in the course of appellant's business, with each tax expressly declared to be in addition to all others and to be imposed "in consideration of the use of the highways of this state."

Neither exaction discriminates against interstate commerce. Each applies alike to local and interstate operations. Neither undertakes to tax traffic or movements taking place outside Montana or the gross returns from such movements or to use such returns as a measure of the amount of the tax. Both levies apply exclusively to operations wholly within the state or the proceeds of such operations, although those operations are interstate in character.

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[12] — Mont. —, —, 172 P. 2d 452, 460. Appellant had argued, as it does here, that even if the "gross revenue" tax is limited to revenue derived from operations in Montana, it is nevertheless invalid for want of any prescribed method on the face of the statute for ascertaining or calculating the tax. The state court held that the statute by necessary implication authorized the board to "adopt any fair and reasonable mode of enforcement designed to effectuate the purposes of the Act." — Mont. —, —, 172 P. 2d 452, 461. In view of our limitation of the question before us, as stated in the text, we need not express opinion concerning this ruling or any tax above the minimum calculated in accordance with it. Cf. note 11.

In another connection the state supreme court adverted to the separability clause contained in § 3847.24 of the statute, though not referring to it expressly in relation to the statement quoted in the text.

Moreover, it is not material to the validity of either tax that the state also imposes and collects the vehicle registration and license fee and the gallonage tax on gasoline purchased in Montana. The validity of those taxes neither is questioned nor well could be. *Hendrick* v. *Maryland*, 235 U. S. 610; *Aero Transit Co.* v. *Georgia Comm'n*, 295 U. S. 285; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506; *Edelman* v. *Boeing Air Transp.*, 289 U. S. 249. Nor does their exaction have any significant relationship to the imposition of the taxes now in question. *Dixie Ohio Co.* v. *Comm'n*, 306 U. S. 72, 78; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 251. They are imposed for distinct purposes and the proceeds, as appellant concedes, are devoted to different uses, namely, the policing of motor traffic and the maintenance of the state's highways.[13]

Concededly the proceeds of the two taxes presently involved are not allocated to those objects.[14] Rather they now go into the state's general fund, subject to appropriation for general state purposes.[15] Indeed this fact, in appellant's view, is the vice of the statute. But in that view appellant misconceives the nature and legal effect of the exactions. It is far too late to question that a state, consistently with the commerce clause, may lay upon motor vehicles engaged exclusively in interstate commerce, or upon those who own and so operate them, a fair and reasonable, nondiscriminatory tax as compensation for the use of its highways. *Hendrick* v. *Maryland*,

[13] See note 6 and text. It is admitted by the pleadings that the proceeds of the vehicle registration and license tax and the gallonage tax are allocated to the construction, repair and maintenance of state highways.

[14] The board concedes in the brief filed here that the state supreme court was in error in the statement that the revenue from the two taxes presently in issue "is devoted to the building, repairing and policing of such highways . . . ." — Mont. —, —, 172 P. 2d 452, 462.

[15] See note 3 and text.

supra; *Clark* v. *Poor*, 274 U. S. 554; *Aero Transit Co.* v. *Georgia Comm'n*, *supra*; *Morf* v. *Bingaman*, 298 U. S. 407; *Dixie Ohio Co.* v. *Comm'n*, *supra*; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583; cf. *S. C. Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177. Moreover "common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use." *Clark* v. *Poor*, *supra* at 557.

The present taxes on their face are exacted "in consideration of the use of the highways of this state," that is, they are laid for the privilege of using those highways. And the aggregate amount of the two taxes taken together is less than the amount of similar taxes this Court has heretofore sustained. Cf. *Dixie Ohio Co.* v. *Comm'n*, *supra*; *Aero Transit Co.* v. *Georgia Comm'n*, *supra*. The state builds the highways and owns them.[16] Motor carriers for hire, and particularly truckers of heavy goods, like appellant, make especially arduous use of roadways, entailing wear and tear much beyond that resulting from general indiscriminate public use. *Morf* v. *Bingaman*, *supra* at 411. Although the state may not discriminate against or exclude such interstate traffic generally in the use of its highways, this does not mean that the state is required to furnish those facilities to it free of charge or indeed on equal terms with other traffic not inflicting similar destructive effects. Cf. *Clark* v. *Poor*, *supra*; *Morf* v. *Bingaman*, *supra* at 411. Interstate traffic equally with intrastate may be required to pay a fair share of the cost and maintenance reasonably related to the use made of the highways.

This does not mean, as appellant seems to assume, that the proceeds of all taxes levied for the privilege of using the highways must be allocated directly and exclusively

[16] It is immaterial that the state receives federal aid for state road construction, a fact on which appellant places some emphasis.

to maintaining them. *Clark* v. *Poor, supra* at 557; *Morf* v. *Bingaman, supra* at 412. That is true, although this Court has held invalid, as forbidden by the commerce clause, certain state taxes on interstate motor carriers because laid "not as compensation for the use of the highways but for the privilege of doing the interstate bus business." *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, 186; cf. *McCarroll* v. *Dixie Lines*, 309 U. S. 176, 179. Those cases did not hold that all state exactions for the privilege of using the state's highways are valid only if their proceeds are required to go directly and exclusively for highway maintenance, policing and administration. Both before and after the *Interstate Transit* decision this Court has sustained state taxes expressly laid on the privilege of using the highways, as applied to interstate motor carriers, declaring in each instance that it is immaterial whether the proceeds are allocated to highway uses or others. *Clark* v. *Poor, supra* at 557; *Morf* v. *Bingaman, supra* at 412.[17]

Appellant therefore confuses a tax "assessed for a proper purpose and . . . not objectionable in amount," *Clark* v. *Poor, supra* at 557, that is, a tax affirmatively laid for the privilege of using the state's highways, with a tax not imposed on that privilege but upon some other such as the privilege of doing the interstate business. Though necessarily related, in view of the nature of interstate motor traffic, the two privileges are not identical, and it is useless to confuse them or to confound a tax for the privilege of using the highways with one the proceeds of which are necessarily devoted to maintaining them. Whether the proceeds of a tax are used or required to be used for highway maintenance "may be of significance," as the Court has said, "when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways.

[17] See note 18 *infra* and text.

Interstate Transit, Inc. v. *Lindsey, supra.* But where the manner of the levy, like that prescribed by the present statute, definitely identifies it as a fee charged for the grant of the privilege, it is immaterial whether the state places the fees collected in the pocket out of which it pays highway maintenance charges or in some other." *Morf* v. *Bingaman, supra* at 412.[18]

The exactions in the present case fall clearly within the rule of *Morf* v. *Bingaman* and its predecessors in authority, and therefore, like that case, outside the decisions in the *Interstate Transit* and like cases. Both taxes are levied "in consideration of the use of the highways of this state," that is, as compensation for their use, and bear only on the privilege of using them, not on the privilege of doing the interstate business. Moreover, the flat $10 fee laid by § 3847.16 (a) is further identified as one on the privilege of use by the fact that "unlike the general tax in *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, the levy of which was unrelated to the use of the highways, grant of the privilege of their use is by the present statute made conditional upon payment of the fee." *Morf* v. *Bingaman, supra* at 410.

The minimum so-called "gross revenue" fee, on the other hand, is technically conditioned on the receipt of such revenue from the operations within Montana. But the flat minimum of $15 annually, which is all we have before us in the shape the case has taken for the purposes of decision here, has none of the alleged vices characteristic of gross income taxes heretofore held to vitiate such taxes laid by the states on interstate commerce. And appellant has advanced no tenable basis in rebuttal of the legislative declaration that this tax too is exacted

[18] In *Clark* v. *Poor,* the Court stated: "Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs." 274 U. S. 554, 557.

in consideration of the use of the state's highways, *i. e.*, for the privilege of using them, not for that of doing the interstate business. Here, as in *Morf v. Bingaman*, "there is ample support for a legislative determination that the peculiar character of this traffic involves a special type of use of the highways," with enhanced wear, tear and hazards laying heavier burdens on the state for maintenance and policing than other types of traffic create. 298 U. S. 407, 411. It is to compensate for these burdens that the taxes are imposed, and appellant has not sustained its burden, *Clark* v. *Paul Gray, Inc.*, *supra* at 599, and authorities cited, of showing that the levies have no reasonable relation to that end.[19]

It is of no consequence that the state has seen fit to lay two exactions, substantially identical, rather than combine them into one, or that appellant pays other taxes which in fact are devoted to highway maintenance. For the state does not exceed its constitutional powers by imposing more than one form of tax. *Interstate Busses Corp.* v. *Blodgett, supra; Dixie Ohio Co.* v. *Comm'n, supra.* And, as we have said, the aggregate amount of both taxes combined is less than that of taxes heretofore sustained. In view of these facts there is not even sem-

[19] Appellant claims that the $15 minimum fee is unreasonable since it is roughly ten times greater than the tax that would be required if the percentage standard provided in the statute were applied. To accept appellant's position would mean that a state could never impose a minimum fee, but would have to adjust its taxes to the inevitable variations in the use of the highways made by various carriers. The Federal Constitution does not require the state to elaborate a system of motor vehicle taxation which will reflect with exact precision every gradation in use. In return for the $15 fee appellant can do business grossing $3,000 per vehicle annually for operations on Montana roads. Appellant was not wronged by its failure to make the full use of the highways permitted. *Aero Transit Co.* v. *Georgia Comm'n*, 295 U. S. 285; *Morf* v. *Bingaman*, 298 U. S. 407; cf. *Kane* v. *New Jersey*, 242 U. S. 160.

blance of substance to appellant's contention that the taxes are excessive.

Neither is there merit in its other arguments, which we have considered, including those urging due process and equal protection grounds for invalidating the levies.

The judgment of the Supreme Court of Montana is

Affirmed.